

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND**

ALBERT A. GRAY, ADMINISTRATOR, ET AL.

Plaintiffs,

v.

JEFFREY DERDERIAN, ET AL.,

Defendants.

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) Civil Action No. 04-312-L
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**MOTION TO DISMISS MASTER COMPLAINT
AGAINST ESSEX INSURANCE COMPANY**

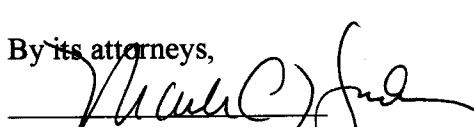
Defendant Essex Insurance Company ("Essex") hereby moves to dismiss the Master Complaint as against Essex pursuant to Fed. R. Civ. P. 12(b)(6). As grounds in support of this Motion, Essex relies upon the Memorandum of Law submitted herewith.

IT SHOULD BE NOTED that EXHIBIT 1 to this Motion and Memorandum - the insurance policy at issue (35 pages) - is referred to but NOT attached since it exceeds the page limitation (10) for exhibits under Local Rule/General Order #2002-01. Accordingly, a motion for leave to exceed that page limitation is filed concomitant with this Motion to Dismiss.

Respectfully submitted,

ESSEX INSURANCE COMPANY

By its attorneys,


Mark C. Hadden (R.I. Bar # 3101)
Law Offices of Mark C. Hadden
68 Kennedy Plaza-Suite 3
Providence, RI 02903
(401) 274-0909
(401) 274-5455 (F)

17

Of Counsel

Mark D. Cahill
Eric D. Hermanson
Kathleen C. Henry
CHOATE, HALL & STEWART
Exchange Place
53 State Street
Boston, MA 02109
(617) 248-5000

Dated: August 25, 2004

1 Plaintiffs' single, unnumbered count against Essex will be referred to in this Motion as the "Claim." In
2 addition to the Claim, Plaintiffs have asserted "general allegations as to all defendants." *See Master Complaint* at ¶
3 271. But these "general allegations" do not set out a claim against Essex; they are nothing more than an overbroad
4 allegation of negligence against all fifty-seven defendants. *See, e.g., Bast v. A.H. Robins & Co.*, 616 F.Supp. 333
5 (E.D. Wis. 1985) (dismissing action against insurer, under Rule 12(b)(6), where relevant counts of complaint did not
6 name insurer, were devoid of any substantive allegation against insurer, and "fail[ed] to allege the basic facts
7 demonstrating the Plaintiffs' entitlement to relief"). Even assuming *arguendo* that Plaintiffs' "general allegations"
8 can be construed to constitute a claim against Essex, those "allegations" would fail for the reasons set forth herein.

In their ill-defined Claim against Essex, Plaintiffs assert that Essex insured Michael Derderian, the owner of The Station, in 2002-2003; that Essex arranged for inspections of The Station, beginning in 1996, apparently to assist it in underwriting its policy; that Essex or its delegates were, somehow, negligent in performing or overseeing these inspections; and that Essex's negligence was a proximate cause of Plaintiffs' death and injuries. *Id.* ¶¶ 574-575. In short, Plaintiffs appear to be asserting either (1) that Essex is liable directly to Plaintiffs as Michael Derderian's insurer, or (2) that Essex is liable directly to Plaintiffs for its alleged negligence in inspecting The Station.

Neither theory can support a finding of liability. To the extent the Claim is based on Essex's status as Michael Derderian's insurer, it is barred by R.I. Gen. Laws 1956 § 27-7-2 (2002) and the well-established public policy forbidding direct actions against insurance carriers. To the extent the Claim is based on Essex's allegedly negligent inspection of the premises, the Claim is barred because Plaintiffs have not pleaded, and cannot credibly plead, that Essex owed any duty to them. Plaintiffs' failure to plead – indeed, their inability to plead – such a duty requires that Plaintiffs' Claim be dismissed.

Argument

Under Fed. R. Civ. P. 12(b)(6), a court must dismiss a complaint for failure to state a claim where, accepting as true all well-pleaded allegations in the complaint, and giving plaintiffs the benefit of all reasonable inferences therefrom, the complaint “presents no set of facts justifying recovery.” *Cooperman v. Individual Inc.*, 171 F.3d 43, 46 (1st Cir. 1999). In considering such a motion, a court should not accept “bald assertions, subjective characterizations and legal conclusions.” *DM Research, Inc. v. College of American Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999). Nor is a court required to accept as true

“conclusory descriptions of a general scenario which could be dominated by unpleaded facts.” *Judge v. Lowell*, 160 F.3d 67, 77 (1st Cir. 1998), *rev'd on other grounds*, 367 F.3d 611 (1st Cir. 2004)). Applying these standards to either of Plaintiffs' two possible theories, Plaintiffs' Claim against Essex should be dismissed.

A. Plaintiffs' Claim Is Barred By R.I. Gen. Laws § 27-7-2.

First, to the extent the Claim arises from its status as Michael Derderian's insurer, it is barred by Rhode Island law and by the well-established public policy forbidding direct actions against insurers. Rhode Island Gen. Laws 1956 § 27-7-2 (“Section 27-7-2”) provides, as a general rule, that an insurer may not be joined as a defendant in an action against the insurer's policyholder, except in extremely limited circumstances:

An injured party, or in the event of the injured party's death, the party entitled to sue for that death, in his or her suit against the insured, *shall not join the insurer as a defendant*. If the officer serving any process against the insured shall return that process “non-est inventus”, or where before suit has been brought . . . the insured has died . . . the injured party, and in the event of that party's death, the party entitled to sue for that death, may proceed directly against the insured. The injured party, or in the event of that party's death, the party entitled to sue for that death, after having obtained judgment against the insured alone, may proceed on that judgment in a separate action against the insurer

R.I. Gen. Laws 1956 § 27-7-2 (2002) (emphasis added). The statute reflects a considered legislative judgment that an injured party may sue a defendant's insurer only after it has “obtained judgment against the insured alone.” R.I. Gen. Laws § 27-7-2; *Mendez v. Brites*, 849 A.2d 329, 332, n.2 (R.I. 2004) (“in Rhode Island and in most other jurisdictions, an injured party lacks standing to maintain a direct action for damages against a tortfeasor's insurer until and unless the injured party has secured a judgment against the tortfeasor”); *Collier v. Travelers Ins. Co.*, 197 A.2d 493, 496 (R.I. 1964). *See also, e.g., Doire v. Commerce Ins. Co.*, 692 A.2d 696, 697 (R.I. 1997); *Clauson v. New England Ins. Co.*, 254 F.3d 331, 336 (1st Cir. 2001). The

purpose of the policy is "to protect the insurance company against the well-known tendency of jurors to fail to consider the merits if a defendant . . . is insured." *Miller v. Metropolitan Cas. Ins. Co.*, 146 A. 412, 414 (R.I. 1929); *Collier*, 197 A.2d at 496.

Here, Plaintiffs have not pleaded, and cannot credibly plead, any of the limited circumstances that might permit the filing of a direct suit against Essex as Michael Derderian's insurer. Plaintiffs do not allege that service on Michael Derderian was returned *non est inventus*. They do not allege that he has died. They do not allege that they have obtained judgment against him. They do not allege that he has filed for bankruptcy. Because Plaintiffs have not alleged any facts that would give them standing to sue Essex directly, their claim against Essex fails, as a matter of law. *See Canavan v. Lovett, Scheffrin, and Harnett*, 745 A.2d 173, 174-75 (R.I. 2000) (affirming trial court's dismissal of complaint against law firm's malpractice insurer, based on plaintiff's failure to plead circumstances that would permit him to bring a direct action against the insurer under § 27-7-2).

B. Essex Owes No Common Law Duty to Plaintiff.

Alternatively, to the extent the Claim is based on Essex's allegedly negligent inspection of The Station during the course of its insurance relationship with Michael Derderian, the Claim must fail because Essex owed no duty to Plaintiffs under its policy of insurance, or under the common law. Duty is, in Rhode Island and elsewhere, a fundamental aspect of tort liability. As one commentator has noted:

The law of negligence does not impose liability upon an individual unless there is a breach of a duty owed to the plaintiff. The mere happening of an event does not warrant a reasonable and legitimate inference of negligence.

1 R.I. Tort Law & Personal Injury Practice, § 85 at pp. 75-76 (2d ed. 1999). Here, Essex had no duty to Plaintiffs under its policy; and it assumed no duty to Plaintiffs in the course of its alleged

inspections. Case law, in Rhode Island and elsewhere, has repeatedly rejected the attempts of injured plaintiffs to impose duties on insurers for "undertaking" inspections of policyholders' premises in circumstances similar to those here.

1. Essex Owes No Duty to Plaintiffs As A Result Of Its Contractual Relationship With Mr. Derderian.

Under Rhode Island law, it is well established that an insurer owes no independent duty of care to third-party claimants as a result of its contractual relationship with policyholders. As the Rhode Island Supreme Court reasoned in *Auclair v. Nationwide Mut. Ins. Co.*, 505 A.2d 431 (R.I. 1986) (per curiam): "the relationship between the claimant and the insurance carrier . . . is an adversary relationship giving rise to no fiduciary obligation on the part of such insurance carrier to the claimant. Any obligation . . . runs only to the insured." *Id.* at 431 (emphasis supplied).

To Essex's knowledge, no Rhode Island case has ever abrogated the privity requirement, or permitted a negligence action by a third party directly against a defendant's insurer, on the strength of the insurer's contractual relationship with the defendant. *See, e.g., Canavan*, 745 A.2d at 174-75 (insurer not liable for bad faith toward allegedly injured plaintiff because it had no duty to act in a fiduciary capacity toward him); *Cianci v. Nationwide Ins. Co.*, 659 A.2d 662, 667 (R.I. 1995) (injured party had no standing to sue insurer for bad faith where said party was not the insured and not a party to the contract of insurance); *see also Theriot v. Midland Risk Ins. Co.*, 694 So.2d 184, 193 (La. 1997) ("[A] cause of action directly in favor of a third-party claimant against a tort-feasor's insurer is not generally recognized absent statutory creation."). Only in limited circumstances, not applicable here, have the courts of Rhode Island disregarded the doctrine of privity to impose a duty on a third party in the context of a negligence action. *See, e.g., Rousseau v. K.N. Construction, Inc.*, 727 A.2d 190, 192 (R.I. 1999) (actions

against architects and engineers); *Temple Sinai-Suburban Reform Temple v. Richmond*, 308 A.2d 508, 510 (R.I. 1972) (actions against defective product manufacturers and suppliers; makers of food; and landlords who fail to abide by promises to repair). These cases do not involve the relationship between an insurer and its policyholder, and involve special considerations not present here.

2. Essex Owes No Independent Duty To Plaintiffs.

Likewise, and not surprisingly, no case in the history of Rhode Island jurisprudence has ever held an insurer liable directly to an injured plaintiff for injuries caused by the insurer's allegedly negligent inspection of the insured's premises. Indeed, in *McAleer v. Smith*, 791 F. Supp. 923, 935 (D.R.I. 1992), this Court held that an insurer's alleged failure to properly inspect a seagoing vessel did not constitute a breach of any duty to plaintiffs who died when the vessel subsequently sank. Even if a proper inspection might have alerted the insurer to an unsafe or otherwise unsatisfactory condition, the *McAleer* Court reasoned, "an insurer is generally not liable for underwriting a foolhardy risk." *Id.*

The decision in *McAleer* is consistent with the rule in most jurisdictions, previously noted, that insurers do not owe a fiduciary duty or common law duty of good faith to third parties. See *Elmore v. State Farm Mut. Auto. Ins. Co.*, 504 S.E.2d 893, 897-98 & n.5 (W.Va. 1998) (collecting cases); *Campbell v. A.H. Robins Co.*, 615 F. Supp. 496, 500 (W.D. Wis. 1985) (holding claims against insurer for injuries caused by its insured's Dalkon Shield products were "faulty for the simple reason that an insurer owes no duty of care to injured third parties under Wisconsin law").² Allowing third parties to bring tort claims against insurers for negligent

² See also *In re A.H. Robins Co.*, 880 F.2d 709, 716 n.11 (4th Cir. 1989) (observing that motions to dismiss had been heard in 40 similar cases filed against Aetna; of those, four had been voluntarily dismissed and 36 motions to dismiss had been granted); *abrogated on other grounds, Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997)

inspection, or on other grounds, “would constitute a radical departure from accepted principles of insurance law.” *Theriot*, 694 So.2d at 193. Moreover, it would create a profound disincentive to insurers to engage in safety-related inspections and services. That, in turn, is directly contrary to Rhode Island public policy, as recognized, for example, in *Mustapha v. Liberty Mut. Ins. Co.*, 268 F. Supp. 890, 895 (D. R.I. 1967).

In *Mustapha*, the Court extended workers’ compensation immunity to an employer’s insurers to prohibit claims that an insurer, as a third-party tortfeasor, deficiently performed voluntary safety inspections. It reasoned:

If an insurance company can escape liability ... by not making any inspections on the premises of the insured, but may incur unlimited tort liability by making some inspections, it more than likely will decline to make any. . . The ultimate losers will be workmen and their families. . . If insurers are to be held liable in tort, as well as for workmen’s compensation, every time such inspection fails to reveal a preventable accident, it would be in effect strict liability. Such additional liability should be imposed only by the legislature and not by the court.

Id. at 894 (internal citations omitted).³ These policy considerations apply with equal force in the context of a third-party claim under a general liability policy. It would make no sense to hold, on the one hand, that employees are barred from suing their employers’ workers’ compensation insurers for allegedly negligent safety-related inspections, and yet, on the other hand, allow third parties to sue liability insurers directly, on precisely the same theory. The ultimate result – the discouragement of safety-related inspections and advisory services – would be the same in both cases. See *Smith II v. Allendale Mut. Ins. Co.*, 303 N.W.2d 702, 709 (Mich. 1981) (finding

³ Cf. *Latour v. Commercial Union Ins. Co.*, 528 F. Supp. 231, 234 (D. R.I. 1981). The *Latour* Court dealt solely with whether the Workers’ Compensation Act insulates an insurer, acting as a workers’ compensation insurer, general liability insurer and risk management consultant, from tort liability for negligent safety inspections. The insurer did not raise, and the Court did not address, whether the insurer owed a duty to plaintiffs.

insurers owed no duty to third parties, and were not liable for negligent inspection); *James v. New York*, 90 A.D.2d 342, 346 (N.Y.App. Div. 1982), *aff'd*, 457 N.E.2d 802 (N.Y. 1983) (same).

3. Plaintiffs Have No Claim For "Negligent Undertaking" Under The Restatement (Second) of Torts § 324A.

Finally, to the extent the Claim is construed as an attempt to assert negligent performance by Essex of an undertaking under the provisions of Restatement (Second) of Torts § 324A (1965), the claim is subject to dismissal on several independent grounds.

First, to Essex's knowledge, no Rhode Island court has ever upheld a finding of liability against an insurer, or anyone else, under Section 324A, which provides, in pertinent part:

One who undertakes, gratuitously or for consideration, to render services for another which he should recognize as necessary for the protection of a third person..., is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if: (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of the reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts § 324A (1965). *See generally Travelers Ins. Co. v. Priority Business Forms, Inc.*, 11 F. Supp.2d 194, 202, 203 n.4 (D. R.I. 1998) (noting that it "not at all clear that the theory of § 323 [an analogous provision that addresses liability to first parties, as opposed to third parties, for negligently undertaking to render services] has been adopted in Rhode Island."). Given the strong public policy against insurer liability for negligent inspection of policyholders' premises, the Rhode Island statute forbidding direct actions against insurers, and the paucity of Rhode Island case law applying § 324A in any context, the legal viability of a § 324A theory to present facts is doubtful at best. *Accord Travelers*, 11 F. Supp. 2d at 202 (noting the absence of Rhode Island Supreme Court authority supporting the abandonment of

traditional rules of proximate cause, and expressing “serious[] doubts that such a case is forthcoming.”).

Second, even assuming, *arguendo*, that a § 324A claim were available to Plaintiffs under Rhode Island law, any such claim must be dismissed because Plaintiffs have failed to plead – and cannot viably plead – a threshold requirement for liability under this theory: that the inspections that Essex allegedly made constituted an “undertaking” by Essex with the purpose of benefiting a third party. *See Smith*, 303 N.W.2d at 705-706 (“Absent evidence that the insurer agreed or intended to provide services *for the benefit of the insured*, there is no basis for the conclusion that such inspections are conducted other than to serve the insurers’ interests in underwriting, rating and loss prevention and hence there is no undertaking”); *Patton v. Simone*, Civ. Action Nos. 90C-JA-29, 90C-JL-219, 1993 WL 54462, at *9 (Del. Super. Ct. Jan. 28, 1993) (to impose liability under § 324A, plaintiff must show that the defendant insurer “intended to render [its] services *to benefit another*, not merely [as] inspection and loss prevention suggestions”). Because the existence of an “undertaking” is a threshold requirement for the imposition of liability in those jurisdictions that recognize a cause of action under § 324A, *Travelers*, 11 F.Supp. 2d at 203, Plaintiffs’ failure to plead the existence of an “undertaking” to benefit the insured or themselves is fatal to their claim. *Smith*, 303 N.W.2d at 706; *see generally 1 R.I. Tort Law and Personal Injury Practice*, § 88 at p. 89 (“a duty voluntarily assumed by the defendant does not give rise to a duty to the plaintiff unless the plaintiff can show that the duty was imposed for his or her benefit”).

Third, even if Plaintiffs were to amend their pleading to allege an “undertaking” as required for liability under § 324A, Plaintiffs’ allegation would be inconsistent with, and is

precluded by, the plain language of the Essex policy at issue.⁴ The Essex policy unequivocally states that any inspections or surveys conducted by or on behalf of Essex “relate *only* to insurability and the premiums to be charged,” and that Essex “do[es] not make safety inspections” and “do[es] not undertake to perform the duty of any person or organization to provide for the health and safety of workers or the public.” Exh. 1 at Common Policy Conditions, § D (emphasis supplied). This language precludes Plaintiffs from asserting that Essex undertook to perform safety inspections for the benefit of its insured or anyone else. *Smith*, 303 N.W.2d at 723; *James*, 90 A.D.2d at 344; see also *Sherlock v. BPS Guard Services, Inc.*, Civ. A. No. 91-2414-EEO, 1993 WL 245980, at * 3 (D. Kan. June 19, 1993) (insurer did not undertake safety inspections to benefit insured where disclaimer in insurer’s safety reports and insured’s loss prevention manual made clear that the insured was solely responsible for hotel safety and security); *Brooks v. New Jersey Manuf. Ins. Co.*, 405 A.2d 466, 468 (N.J. Super. 1979) (policy provision that stated “neither the right to make inspections nor the making thereof shall constitute an undertaking on behalf of or for the benefit of the insured or others” precluded finding that insurer undertook safety inspection to benefit others).

Fourth, even if Plaintiffs were, somehow, exempted from pleading or proving an “undertaking” under § 324A, they still have not pleaded that Essex increased their risk of harm pursuant to subsection (a). Courts interpret the “increased risk of harm” requirement as necessitating a showing that the defendant, through affirmative actions, caused some physical change to the environment or some other material alteration of circumstances. *Thames Shipyard and Repair Co. v. United States*, 350 F.3d 247, 261 (1st Cir. 2004). “The test is not whether the

⁴ A copy of the Essex policy is attached as Exhibit 1 to the present motion. Because the policy is referenced in (and central to) the Claim, Essex properly may attach a copy of the policy without converting its motion to dismiss into a motion for summary judgment. *Fudge v. Penthouse Intl. Inc.*, 840 F.2d 1012, 1015 (1st Cir. 1988); citing 5 C. Wright & A. Miller, *Fed. Pract. & Proc.* § 1327 at 489 (1969).

risk was increased over what it would have been had defendant not been negligent, but rather whether the risk was increased over what it would have been had the defendant not engaged in the undertaking at all.” *Id.* (quotations and citations omitted); *see also Smith*, 303 N.W.2d at 715 n.33; *Paz v. California*, 994 P.2d 975, 981 (Cal. 2000) (“failure to alleviate a risk cannot be regarded as tantamount to increasing that risk”); *Patton*, 1993 WL 54462, at *9 (“An increased risk means that there must have been some physical change to the environment or material alteration of the circumstances.”) (citation omitted). Here, Essex is not alleged to have created the conditions that supposedly caused Plaintiffs’ injuries or to have made any physical changes to Plaintiffs’ environment as a result of its inspections. *See, e.g. Zabala Clemente v. United States*, 567 F.2d 1140, 1145 (1st Cir. 1978) (failure to inspect did not add to the risk of injury to passengers or crew caused by overweight aircraft and improper flight crew). Thus, there is no basis for liability under the first subsection of § 324A.

Fifth, Plaintiffs fail to plead (and cannot viably plead) that Essex assumed any duty the insured may have owed to third parties. To satisfy this element, Plaintiffs must establish that Essex wholly “supplanted,” and not just supplemented, any duty to inspect that the insured may have been owed to Plaintiffs. Restatement (Second) of Torts § 324A cmt. d; *see also Howell v. United States*, 932 F.2d 915, 919 (11th Cir. 1991); *Patton*, 1993 WL 54462, at *9. Plaintiffs do not plead that Essex intended to supplant any duty of its policyholder, Michael Derderian, or others to conduct safety inspections.⁵ Nor, in light of the policy language at issue, could

⁵ Tellingly, in fact, Plaintiffs’ Master Complaint alleges that a number of defendants *other than* Mr. Derderian – including the Fire Inspector for the Town of West Warwick – bore legal responsibility for inspecting The Station and for enforcing the fire code and building laws of the State of Rhode Island. *Master Complaint* at ¶ 413. Plaintiffs plead that the Fire Inspector negligently failed to properly inspect The Station, and make the same allegations against the Fire Inspector and the Town of West Warwick as they do against Essex. *Id.* at ¶¶ 419, 433-434. Because Plaintiffs’ Master Complaint alleges repeatedly that the duty to conduct safety inspections lay with individuals other than Mr. Derderian, it is hard to understand how Essex is alleged to have “supplanted” Mr. Derderian’s duty in this respect.

Plaintiffs plausibly make such an argument. *Id.* at * 10 (insurer who conducted inspection of premises did not supplant insured's duty to provide employees with a safe workplace). There is no basis for liability under the second subsection of § 324A.

Finally, with respect to subsection (c), Plaintiffs do not allege that they relied on Essex's alleged inspections or that they took any action or inaction in response to them. *See Thames*, 350 F.3d at 262. The "reliance" element of a § 324 claim requires that the Plaintiffs were, through the Defendant's actions, "induced . . . to forgo other remedies or precautions against the risk." *Id.* (quoting Restatement (Second) of Torts § 324A, cmt. e). Here, Plaintiffs do not allege – and cannot allege – that they were aware of any inspections conducted by Essex when they elected to attend The Station nightclub; or that they limited their own safety precautions in reliance upon them. *Zabala*, 567 F.2d at 1145; *Patton*, 1993 WL 54462, at * 10. Thus, there is no basis for liability under the third subsection of § 324A.

C. Imposition Of The Legal Duty Suggested By Plaintiffs Would Undermine Fundamental Premises of Insurance Law And Create Irreconcilable Conflicts Between Insurers and Their Insureds.

However it is characterized, Plaintiffs' theory of liability against Essex seeks, at bottom, to impose a legal duty on insurers to warn third parties – indeed, the world – of potential hazards involving their policyholder's premises. If accepted by the Court, this theory would radically undermine centuries of insurance law, and would fundamentally alter the heart of the insurer-insured relationship.

The purpose of insurance is to transfer risk of liability pursuant to carefully negotiated contracts subject to the terms and conditions set forth in those contracts after disclosures by the policyholder and payment of appropriate premiums commensurate with the risk. In order to assess the risk, and the appropriate premiums, insurers often conduct inspections of the risk.

Insurance policies often explicitly provide that any inspections of the risk are solely for the purposes of assessing the risk and setting premiums. With this language, insurers unequivocally declare that they do not warrant to the policy holder or the public at large that the insured will never harm anyone, or that the insured risk will not come to pass.

For centuries courts have looked to the terms of insurance contracts to delineate the duties and rights of insurers and their policyholders. If plaintiffs are permitted to sue not only premises owners for negligence or other claims (which in many if not most instances already are borne by the defendants' insurers), but also each of those parties' insurers directly for negligence, insurance law and the insurance industry would be turned on their heads. Insurers would be exposed to limitless liability and would never be able to manage risks through policy language or otherwise. Moreover, insurance companies would be unable to assess risks of their insureds' premises in order to price their policies and determine premiums. The resulting insurance crisis would reduce or eliminate the availability to businesses of comprehensive liability insurance.

The duty that Plaintiffs invite this Court to create also would place insurers in an impossibly conflicted position of owing duties both to their policyholders and to the third-party claimants that are their policyholders' actual or potential litigation adversaries. *See, e.g., Theriot*, 694 So.2d at 193 ("The relationship between the insurer and third-party claimant is neither fiduciary nor contractual; it is fundamentally adversarial. For that reason, a cause of action directly in favor of a third-party claimant against a tort-feasor's insurer is not generally recognized absent statutory creation."). This would directly contradict the bedrock duties of an insurer in Rhode Island to its policyholders. In related contexts, such as in bad faith litigation, Rhode Island courts have refused to recognize a hypothetical duty to a third-party claimant that

would conflict with a duty owed to the insured. *Canavan*, 745 A.2d at 174-75; *Cianci*, 659 A.2d at 667. Other jurisdictions to consider the issue are in accord.⁶


Conclusion

This Court should decline Plaintiffs' invitation to create new duties that are not authorized by any statute, are inconsistent with legislative enactments and common law, and would place insurers at risk of owing conflicting duties to their policyholders and third parties. As respects Essex, Plaintiffs' Master Complaint should be dismissed.⁷

Respectfully submitted,

ESSEX INSURANCE COMPANY

By counsel,


Mark C. Hadden (R.I. Bar # 3101)
Law Offices of Mark C. Hadden
68 Kennedy Plaza - Suite 3
Providence, RI 02903
(401) 274-0909

⁶ See, e.g., *Elmore*, 504 S.E.2d at 899 ("the significant duty owed by the insurer to the insured certainly forecloses any like duty owed by the insurer to a third party who is an adversary of the insured"); *Larocque v. State Farm Ins. Co.*, 660 A.2d 286, 288 (Vt. 1995) (because "relationship between [third-party claimants] and [defendant insurers] is by nature adversarial, . . . we find no obligation imposed on defendants to conform to a particular standard of conduct with respect to plaintiffs"; nor did defendants voluntarily assume any such duty by their conduct); *Fobes v. Blue Cross and Blue Shield of Arizona*, 861 P.2d 692, 694 (Ct. App. Ariz. 1993) ("a stranger to the insurance contract can assert no claim for bad faith against the insurer"); *Dvorak v. American Family Mut. Ins. Co.*, 508 N.W.2d 329, 331 (N.D. 1993) ("Absent a clause in the insurance contract bestowing the right to bring a direct action against the insurer, an injured party's claim must be asserted against the tortfeasor, not the tortfeasor's insurer.").

⁷ In addition to the grounds discussed above, the Master Complaint also is dismissible for lack of personal jurisdiction. Essex is an approved surplus lines insurer domiciled in Delaware; all of its business is considered exported out of state. Essex is not licensed to do business in Rhode Island, it does no business in Rhode Island, and it never has issued contracts of insurance in Rhode Island or elsewhere. It does not appoint (or have) agents in Rhode Island, as required for admitted carriers, and it is prohibited from writing admitted business or even from advertising in Rhode Island. At the present time, Essex does not believe it is necessary to assert these arguments, because the overarching defects in the Master Complaint, described above, render the question of personal jurisdiction moot. However, Essex does not waive, and expressly reserves, its right to file a supplemental memorandum, challenging personal jurisdiction, should this Court decline to dismiss the Master Complaint for failure to state a claim. See, Fed. R. Civ. P. 12(b), (g) and (h)(1).

Of Counsel

Mark D. Cahill
Eric Bradford Hermanson
Kathleen C. Henry
CHOATE, HALL & STEWART
Exchange Place
53 State Street
Boston, MA 02109
(617) 248-5000

Dated: August 25, 2004

Certification of Service

I hereby certify that the within pleading has been forwarded by first class mail to those as appear on the service list below on August 25, 2004.


Mark C. Hadden

Patrick T. Jones, Esq.
Cooley Manion Jones LLP
21 Custom House Street
Boston, MA 02110-3536

Mark S. Mandell, Esq.
Mandell, Schwartz & Boisclair
One Park Row
Providence, RI 02903

Michael A. St. Pierre, Esq.
Revens, Revens & St. Pierre
946 Centerville Road
Warwick, RI 02886

Steven Minicucci, Esq.
Calvino Law Associates
373 Elmwood Avenue
Providence, RI 02907

Fred A. Kelly, Jr., Esq.
Randall L. Souza, Esq.
Ian C. Ridlon, Esq.
Nixon Peabody LLP
One Citizens Plaza
Providence, RI 02903

Marc DeSisto, Esq.
DeSisto Law
211 Angell Street
P.O. Box 2563
Providence, RI 02906-2563
Thomas W. Lyons, Esq.
Strauss, Factor & Lopes
403 South Main Street
Providence, RI 02903

Max Wistow, Esq.
Wistow & Baryllick Incorporated
61 Weybosset Street
Providence, RI 02903

Stephen E. Breggia, Esq.
Breggia, Bowen & Grande
395 Smith Street
Providence, RI 02908
Eva Marie Mancuso, Esq.
Hamel, Waxler, Allen & Collins
387 Atwells Avenue
Providence, RI 02909

Charles N. Redihan, Jr., Esq.
Kiernan, Plunkett & Redihan
91 Friendship Street
Providence, RI 02903

Joseph V. Cavanagh, Jr., Esq.
Kristin E. Rodgers, Esq.
Blish & Cavanagh
30 Exchange Place
Providence, RI 02903

Richard W. MacAdams, Esq.
MacAdams & Wieck, Inc.
101 Dyer Street
Providence, RI 02903

James R. Lee
Dept of the R.I. Attorney General
150 South Main St.
Providence, R.I. 02903

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Cooley Manion Jones LLP
21 Custom House Street
Boston, MA 02110-3536

Mark S. Mandell, Esq.
Mandell, Schwartz & Boisclair
One Park Row
Providence, RI 02903

Michael A. St. Pierre, Esq.
Revens, Revens & St. Pierre
946 Centerville Road
Warwick, RI 02886

Steven Minicucci, Esq.
Calvino Law Associates
373 Elmwood Avenue
Providence, RI 02907

Fred A. Kelly, Jr., Esq.
Randall L. Souza, Esq.
Ian C. Ridlon, Esq.
Nixon Peabody LLP
One Citizens Plaza
Providence, RI 02903

Marc DeSisto, Esq.
DeSisto Law
211 Angell Street
P.O. Box 2563
Providence, RI 02906-2563
Thomas W. Lyons, Esq.
Strauss, Factor & Lopes
403 South Main Street
Providence, RI 02903

Max Wistow, Esq.
Wistow & Baryllick Incorporated
61 Weybosset Street
Providence, RI 02903

Stephen E. Breggia, Esq.
Breggia, Bowen & Grande
395 Smith Street
Providence, RI 02908
Eva Marie Mancuso, Esq.
Hamel, Waxler, Allen & Collins
387 Atwells Avenue
Providence, RI 02909

Charles N. Redihan, Jr., Esq.
Kiernan, Plunkett & Redihan
91 Friendship Street
Providence, RI 02903

Joseph V. Cavanagh, Jr., Esq.
Kristin E. Rodgers, Esq.
Blish & Cavanagh
30 Exchange Place
Providence, RI 02903

Richard W. MacAdams, Esq.
MacAdams & Wieck, Inc.
101 Dyer Street
Providence, RI 02903

James R. Lee
Dept of the R.I. Attorney General
150 South Main St.
Providence, R.I. 02903